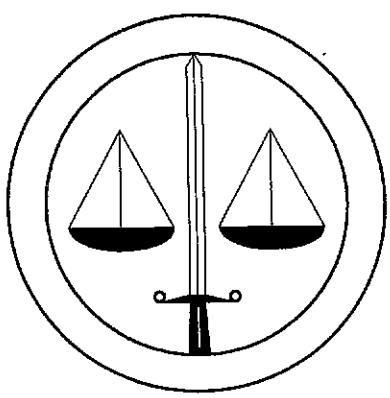
BUREAU OF CRIME STATISTICS
AND RESEARCH

BAIL AND DRUG CHARGES



Attorney-General's Department
New South Wales

BAIL AND DRUG CHARGES

NSW Bureau of Crime Statistics and Research
Department of Attorney-General
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Contents

SUMMARY OF FINDINGS

1. Only 13.4% of the sample were refused bail throughout the proceedings.

2. Bail decisions by courts and by police were related to the nature of the charge. Charges related to drug importation were strongly associated with bail refusal.

3. Changes to bail conditions were not significantly related to the nature of the charge. Only a small percentage of bail decisions are reviewed by the Supreme Court. Most reviews result in bail being granted where it had been refused.

4. The rate of absconding, overall, was assessed at 9.8%. The rate was not related to the nature of the charge the quantity of drugs allegedly involved or the conditions of bail.

5. There were no cases in which persons found in possession of what would be a commercial quantity of drugs under the new Drug Misuse and Trafficking Act absconded. Fifteen were known to have been granted bail.

6. Nearly a quarter of those refused bail spent six months or more in prison on remand awaiting trial.

7. Nearly 50% of those remanded in custody, at some stage or other, end up with their case either withdrawn, dismissed or are found not guilty or receive a non-custodial penalty.

1.0 BACKGROUND

"Although it is perfectly true that the community must be protected against dangerous offenders, one must not lose sight of the circumstances, first that when bail is being considered, one is confronted with an alleged crime and an unconvicted person, and, second, that the liberty of the subject is one of the most fundamental and treasured concepts in our society.

> (The Honourable Mr. Frank Walker, second reading speech to the Bail Bill (NSW) Hansard December 14, 1978).

"The $50,000 bail he was granted is peanuts to a man like this", he said. "We are very hostile. He should never have been granted bail".

> (Victorian C.I.B. Commander Phil Bennett commenting on the failure to appear at court of Mr. Esmond Arnold Mooseek, as reported in "The Australian" 2.11.85).

"When one of those allegedly involved in the sickening trade of supplying the raw materials manages to thumb his nose at justice it can only encourage other parasites, who do not care about the consequences of their actions, to enter the lucrative drug trade".

> ("The Australian" (Editorial) November 5, 1985)

1.1 The question of bail for persons charged with drug-related offences has been the subject of considerable debate, both before and after reforms to bail procedures introduced in the NSW Bail Act (1978). Prior to the Act, persons charged with sections 21 and 32 of the Poisons Act (1966), upon being committed for trial, became, by reason of Section 45 (1)(B) of the NSW Justice Act, automatically entitled as a right to bail no matter how serious the offence or what the risk of the person concerned absconding from bail. The Bail Act removed the anomaly but, in the minds of many, created a new and unsatisfactory state of affairs because it provided for a general presumption in favour of bail for all offences other than armed or otherwise violent robbery.

The most common objection advanced against the presumption has generally been that persons charged with serious drug offences are likely to ascond on bail. According to the NSW Police Department, for example,

> "... experience has shown that there are now more absconders from bail by persons charged with serious drug offences than any other crime". (1)

The Australian Royal Commission of Inquiry into Drugs echoed these sentiments in its report. According to the Royal Commissioner, Justice Williams:

> "The high rate of persons absconding while on bail for such offences is rapidly becoming a national scandal". (2)

More recently, the NSW Police Board, in its second Annual Report observed that:

> "The Drug Law Enforcement Bureau in the second half of the year laid more than 2000 charges for supply, possession and use of drugs .... Virtually all the offenders were promptly released on bail, in all probability immediately to resume the activities for which they had been arrested". (3)

1.2 Surprisingly little reliable statistical evidence has been advanced to justify these assertions. There has also been little effort put to defining just which class of drug offenders are to be regarded as 'serious' and hence putatively most at risk of absconding. The Williams Royal Commission, for example, considered that serious drug offences included all Division I offences (4), whereas the NSW Police Board seems to take the view that all persons charged with drug offences are equally likely to abscond, though it recommends a removal of the presumption in favour of bail only for an undefined class of 'serious' drug offences (5). The evidence put forward in support of the assertions has mostly either been anecdotal, such as some of that relied upon by the Williams Royal Commission (6), or has been based on simple counts of the numbers of persons who have absconded. In the latter case there is commonly no reference either to the number of persons granted bail or the kinds of charges which have been laid against those persons (7).

1.3 The confusion over evidence is matched to some extent by a confusion over the requirements of the NSW Bail Act, vis a vis the presumption in favour of bail. Section 9(2) of the Act states that:

> "(2) A person accused of an offence to which this section applies is entitled to be granted bail in accordance with this Act unless -

a) the authorised officer or court is satisfied that he or it is, pursuant to a consideration of the matters referred to in section 32, justified in refusing bail,

b) the person stands convicted of the offence or his conviction for the offence is stayed: or

c) the requirement of bail is dispensed with, as referred to in section 10.

Section 32 of the Act then details the considerations which a court or authorised officer must take into account when determining whether there exists justification for refusing bail. The considerations include, inter alia, the probability of the defendant's subsequent court appearance, the person's background and community ties, previous failures to appear in court, the seriousness of the offence (including the strength of the relevant evidence and the severity of the penalty or probable penalty), the interests of the defendant and the likelihood of the defendant committing an offence while on bail (8). Clearly the presumption in favour of bail, where it is applies, may easily be counterbalanced by other factors of bail refusal.

1.4 Nonetheless there is a discernible tendency in public discussion on bail to assume, tacitly at least, that the presumption in favour of bail establishes an unconditional right to bail. As a case in point, a recent editorial column in "The Australian" called for a tightening of bail procedures where the alleged crime (such as drug importation) "is so serious that the liberty of the accused should obviously be curtailed". (9) This is a curious view, since Section 32(1)(a)(iii) of the NSW Bail Act nominates offence seriousness as a legitimate ground for bail refusal. One can only assume that the presumption in favour of bail was being treated in isolation from the considerations which may overbear that presumption (10). Of course it may be that, in practice, these considerations are not being given enough weight by courts making bail decisions. However, even if this is true, it remains unclear whether the solution lies in removal of the presumption in favour of bail for certain drug offences, or in clearer guidance from appellate courts on the weight to be assigned to offence seriousness in bail decisions.

1.5 The apparently unreliable evidence and somewhat confused debate on the issue of drug offences and bail presumption has induced some commentators to argue against removal of the presumption in favour of bail. The Woodward Royal Commission into Drug Trafficking, for

example, acknowledged the NSW Police Department claim that a disproportionate number of persons charged with serious drug offences abscond on bail, but offered its opinion that:

"nevertheless such persons do not appear to be disproportionately absent at the commencement of their trials" (11).

The Commission went on to recommend that:

> ".... legislation to diminish or remove this risk (i.e. of absconding) represents too high a price to pay for the increased assurance that such alleged offenders will be present at their trials" (12).

The Woodward Royal Commission, then, would seem to be placing greater reliance, in its recommendations on the civil liberties considerations relevant to treatment of an alleged offender than on the need to institute procedures which give the assurance of his or her appearance in court. Nonetheless, it is evident that its view was conditioned, at least in part, by doubts that the rate of absconding on bail by serious drug offenders is disproportionately high.

1.6 The Stewart Royal Commission into Drug Trafficking, which followed the Woodward Royal Commission, offered the first statistical evidence in support of these doubts. It had the benefit of a study conducted by the Queensland Department of Justice on the relative rates of absconding before and after the introduction of the 1980 Queensland Bail Act (13). The findings of that study were summarized in a table in the Report of the Royal Commission, which is reproduced below.

TABLE 1

PERCENTAGE OF TOTAL OFFENDERS ABSCONDING IN THE HIGHER COURTS OF QUEENSLAND

	DRUG TRAFFICKING	OTHER DRUG OFFENCES	OTHER SERIOUS OFFENCES	OTHER OFFENCES
Before new Bail Act	11.4%	13.3%	6.1%	7.5%
After new Bail Act	11.9%	8.8%	4.8%	6.0%

That data were subjected to a Chi-Square (14) analysis and the results interpreted by the Queensland Department of Justice in the following terms:

"Before the introduction of the Bail Act 1980, offenders (sic) charged with drug trafficking offences absconded more often than did offenders (sic) charged with other serious offences or other minor offences, but not more than offenders (sic) charged with other drug offences.

The Bail Act 1980 has apparently had the effect of significantly reducing the proportion of absconders who were charged with drug trafficking offences, though not the proportion of absconders charged with other offences.

In summary the Bail Act 1980 has reduced the number of drug traffickers who abscond on bail" (15).

1.7 The study is interesting, not least because it purports to show in a statistically reliable way that absconding by persons charged with drug offences is significantly higher than that of persons charged with other offences, at least before the introduction of the Bail Act in Queensland. One major thrust of that legislation had been to make the conditions for the granting of bail to persons charged with drug-trafficking more stringent. The apparent finding then, that the Bail Act reduced the rate of absconding, by persons charged with drug-trafficking, down to the level characteristic of persons charged with non-drug offences, carries with it a suggestion that bail laws may be adjusted to reduce the likelihood of a persons granted bail absconding.'

A close examination of the data referred to in the Stewart Royal Commission, however, raises a number of methodological issues which call into question the conclusions of the Queensland Justice Department study. The title of Figure 1 fails to make clear whether the percentages referred to are based on:

1) the relative frequency of persons absconding who are charged with a given class of offence; or

2) the relative frequency of persons on <u>bail</u> who abscond and are charged with a given class of offence.

Estimates of absconding based on (1) have as their denominator the total number of persons charged with a particular class of offence. Estimates of absconding based on (2) have as their denominator the number of persons charged with a particular class of offence and granted bail. Percentages of absconding based on the former method are misleading. A low percentage may indicate a low likelihood of bail absconding but may also reflect a low likelihood of bail being granted in the first place. Estimates of the rate rather than the frequency of absconding should obviously use the second choice of denominator.

1.8 The summary of results quoted in the Stewart Royal Commission Report sometimes indicates the choice of one, sometimes the other method of calculation. For example, among the conclusions made by the Queensland Justice Department it observed that:

> "After the introduction of the Bail Act 1980, offenders charged with drug trafficking offences absconded significantly less often than did offenders charged with minor offences" (16).

The observation suggests that the incorrect method of calculation was employed. The Bureau sought to clarify the position by obtaining a copy of the original submission by the Queensland Justice Department. That submission, however, failed to make clear the method of calculation. Whether the Queensland study may be taken as providing evidence to support the removal of the presumption in favour of bail, therefore, remains uncertain.

1.9 Earlier investigations by the Bureau into the rate of absconding by persons charged with serious drug offences do not support the assumption that it is high. Stubbs, in the first of her reports on bail, found that the charge distribution among absconders emphasized charges of larceny, drink-driving, offensive behaviour and driving offences. Table 2, below, is constructed from Tables 4 and 31 of her report (17) and shows the rates of absconding on bail by persons charged with various other offences. It can be seen from this table that, apart from charges of unlawful possession of property and damage to property, which had no absconders, persons charged with drug offences were least likely to abscond.

TABLE 2
RATE OF ABSCONDING BY OFFENCE*

CHARGE GROUP	NO GRANTED BAIL	NO ABSCONDING	ABSCONDING RATE
Against the Person	31	4	12.9%
Fraud	17	1	5.9%
Break Enter and Steal	28	1	3.6%
Larceny	155	6	3.9%
Unlawful Possession of Property	17	0	0.0%
Driving	42	3	7.1%
Damage of Property	14	0	0.0%
Offensive Behaviour	61	5	8.2%
Drink Driving	202	7	3.5%
Drug Offences	52	2	3.8%
Other	19	1	5.3%

1.10 There is a serious limitation with this data, however, as a source of guidance on the rates of absconding by persons charged with serious drug offences. It is that the bail decisions in Table 2 are those of police made over a two week observation period. For this reason there will have been a high proportion of the less serious kinds of drug charges among those who were granted bail. This is partly true because, as will be shown later, police are more likely to refuse bail to persons charged with more serious offences. But it is also true because there are likely to be many more less serious drug-related charges laid by police over a two week observation period than there are serious charges laid.

There is obviously a need to analyse the process of bail and its relationship to absconding in more detail than the existing evidence allows. An ideal investigation would examine the issue for all offences. In fact, ideally, these phenomena ought to be subject to the kind of continuous monitoring afforded (say) the disposition of criminal charges by the courts. Neither possibility was feasible under the constraints of the present report. It was therefore necessary to deal with the question of bail consideration and absconding in where it had become an issue. For the present, this is nowhere more the case, than in relation to serious drug charges.

The present study is, accordingly, part descriptive and part analytic. The descriptive component is an attempt to place on record the general features of the bail process in relation to serious drug charges. The more analytic component is an attempt to determine whether the rate of bail absconding is related to factors such as charge, level of bail conditions, alleged drug quantity and prior criminal record. It is to be hoped that the results will furnish a more rational footing for debating possible changes to bail law.

NOTES

1. As reported in the Report of the Woodward Royal Commission into Drug Trafficking, 1979 pp. 1828.

2. The Australian Royal Commission of Inquiry into Drugs. The Hon. Mr. Justice E S Williams (Commissioner). Australian Government Printer. 1980. Book F, pp.35.

3. Police Board of New South Wales. Annual Report 1984-1985 pp.22.

4. Op. cit. ref. (2) pp.36.

5. Op. cit. ref. (3)

6. Op. cit. ref. (2)

7. This is a feature both of the Australian Royal Commission of Inquiry into Drugs and of the 1984-85 Annual Report of the Police Board of New South Wales.

8. The NSW Bail Act (1978) ss 31-33

9. The Editorial "Bail and Justice". "The Australian" November 5, 1985.

10. Op. cit. ref. (8)

11. Report of Royal Commission into Drug Trafficking. Mr. Justice Woodward (Commissioner). 1979.
Chapter 49, pp.1830

12. Ibid.

13. Report of the Royal Commission of Inquiry into Drug Trafficking. Mr. Justice Stewart (Commissioner) 1983 pp.552-554.

14. This is a non-parametric test commonly employed with frequency data to establish whether observed differences should be attributed to chance alone. Cf. Nonparametric Statistics Siegal. McGraw-Hill Kogakusha Ltd. Japan. 1956. Chap. 6 pp.104.

15. Op. cit. ref. (13) pp.554.

16. Ibid.

17. Bail Reform in NSW. J. Stubbs. New South Wales Bureau of Crime Statistics and Research. Department of Attorney-General 1984. pp.14 and pp.61

2.0 Method

2.1 An unresolved issue in the discussion so far has been the question of how to define a 'serious drug offence'. The question, methodologically speaking, is simply one of deciding what kinds of drug offence to count as serious and include within the sample under study. This, however, presents some difficulties. A broad definition of the term 'serious drug offence' is ideal in that it permits the widest possible comparisons to be made between offences of varying seriousness. It also suffers the drawback, though, of limiting the absolute frequency of some of the most serious (and less frequent) of drug offences. This problem may be overcome by taking larger samples, but only at the cost of greater delay in the data collection process.

2.2 The compromise settled on in this study was to count as serious any drug charge proceeded with by way of indictment. The sample was restricted, however, to cases finalised in 1984 in the Sydney District Court or, if not finalised, in respect of which a warrant was issued for the arrest of the defendant consequent upon his or her failure to appear in court. The sample criteria yielded 301 cases; 225 of which involved alleged offences against the N.S.W. Prisons Act and 76 of which involved alleged offences against the Commonwealth Customs Act. However, 27 State and 13 Federal files associated with these cases were unavailable and 12 files had insufficient information in them to be useful. This produced an actual sample size of 246 cases involving 182 persons charged under the Poisons Act and 64 persons charged under the Customs Act. Unfortunately, not every file contained all of the information requisite to all of the questions encompassed in the survey. In 40 cases police bail decisions at the first court appearance were not recorded. In 19 cases bail decisions at the first court appearance were not recorded.

For those cases in which it was unclear for bail forms or court running sheets what bail decision had been made, attempts were made to obtain the relevant information from court transcripts. This was generally successful but, as will become apparent, there were several cases in which the bail decision was not determinable. All data was entered onto pre-coded forms and analysed on an IBM PC microcomputer using SPSS.

2.3 In what follows, charges are grouped on the following basis (unless where otherwise indicated). The category 'Import' comprises charges relating to importing prohibited imports, conspiracy to do so, possession of prohibited imports and knowingly concerned with

prohibited imports(cf. Commonwealth Customs Act. ss. 233B). The category 'Prohibited Drug' comprises charges related to the supply of or conspiracy to supply a prohibited drug as prescribed under Division 3 of the NSW Poisons Act (1966). The category 'Drug of Addiction' (except leaf form I.H.) comprises charges involving the supply or conspiracy to supply a drug of addiction (other than indian hemp) as prescribed under Division 1 of the NSW Poisons Act. The category 'Leaf Form Indian Hemp' comprises charges made under the same Division but in relation only to indian hemp. Finally, the category 'Cultivate' comprises charges involving the cultivation of or conspiracy to cultivate a plant prohibited under Division 4 of the NSW Poisons Act.

2.4 The classification is based partly on the differences in statutory maximum penalties associated with these offences and partly on discriminations made in actual sentencing practice. Table 3, below, displays the relevant statutory maxima. It should be noted that charges in category (2) generally involve the supply of heroin, whereas charges in category (3) generally involve the supply of (non leaf form) indian hemp (eg. 'hashish'). The two categories involve the same statutory maxima but cases involving heroin are generally regarded more seriously by the courts than those involving indian hemp and its derivatives (1).

Table 3

Statutory Maximum Penalties for Selected Drug Offences

	Offence Category	Maximum Penalty
(1)	'Import' (cf.s.235, Commonwealth Customs Act)	Life Imprisonment
(2)	'Prohibited Drug' (cf.ss.32(1), 45(A)(1)(c), NSW Poisons Act)	15 yrs Imprisonment + $200,000 fine.
(3)	'Drug Addiction' (cf.ss.21(1), 21(2)(A), 45(A)(1)(a) and (b) NSW Poisons Act)	15 yrs Imprisonment + $200,000 fine.*
(4)	'Cultivate' (cf.ss.33A(1)(b), 45(A)(1)(d), NSW Poisons Act)	10 yrs Imprisonment + $200,000 fine.

* Charges in this category generally involve refined forms of indian hemp. However, the category (4) includes all cases where the substance involved contains not more than 3 per cent by weight of tetrahydrocannabinol

Notes

(1) See, for example, Rv Karnowski, Unreported, N.S.W. Court of Criminal appeal, 6.3.80. The observations of Roden J are pertinent here.

3.0 Results

Table 4

Principal Charge by Police Bail Decision*

COUNT ROW PERCENTAGE COLUMN PERCENTAGE	BAIL DECISION		
CHARGE	Unconditional	Conditional	Refused
IMPORT		5 10.0 7.8	45 90.0 50.6
PROHIBITED DRUG	4 10.8 14.3	16 43.2 25.0	17 40.0 19.1
DRUG OF ADDICTION (except leaf form I.H.)	7 18.9 25.0	17 45.9 26.6	13 35.2 14.6
LEAF FORM INDIAN HEMP	14 32.0 50.0	21 48.8 32.8	8 18.6 9.0
CULTIVATE	3 2.14 10.7	5 35.7 7.8	6 42.9 6.7
COLUMN TOTAL	28 15.5	64 35.4	89 49.2

* 25 cases not included in Table 4 were taken straight to court. In 40 cases the bail decision was not determinable.

3.1 Police Bail Decision

Table 4, above, shows the police bail decision, according to principal charge. The two most notable features of Table 4 are, firstly, that police bail decisions, where indictable drug charges are concerned, generally favour bail refusal (49.2%) or conditional bail (35.4%) and secondly, that bail is usually if not invariably refused where import charges are concerned (90%). Table 4 also shows that bail is likely to be refused in cases involving the supply of a prohibited drug (46.0%) and cultivation of a prohibited drug (42.9%). The numbers in this latter category, though, are too small to be confident that the sample percentage is an accurate estimate of the true percentage of bail refusals in this category.

When 'Cultivate' charges are excluded, the relationship between bail decision and alleged offence is found to be significant ($X2 = 58.1$, $df. = 6$, $p<.01$). The bail decision seems to be related to the seriousness of the alleged offence, at least so far as the comparison in bail refusal rates for importation and other charges are concerned. The difference between the category 'Prohibited Drug' and 'Drug of Addiction' (except leaf-form I.H.), as noted earlier, is that, although both involved refined classes of drugs, the former category comprises mainly heroin supply charges. The category 'Leaf-Form Indian Hemp', on the other hand, comprises charges pertaining to the supply of a less refined form of the drug. It may well be that the decreasing bail refusal rates across these categories reflects a police judgment concerning their relative seriousness (higher bail refusal rates being associated with higher perceived seriousness of the charge).

3.2 First Court Bail Decision

Under section 20 of the NSW Bail Act an accused person who is refused bail by police or who is not released on bail granted by police (1) must be brought before a court for bail consideration 'as soon as practicable'. For those released on bail by police the next occasion on which bail is considered occurs when they first appear in court in relation to the charges in question. Section 22 of the Bail Act allows an unlimited number of bail applications and (except, perhaps, for very minor charges) bail will ordinarily be considered on each occasion that the defendant appears in court. Table 5, below, shows the first court bail decision by principal charge for the sample of defendants under consideration.

Table 5

Principal Charge by First Court Bail Decision

COUNT ROW PERCENTAGE COLUMN PERCENTAGE	BAIL DECISION*		
CHARGE	Unconditional	Conditional	Refused
IMPORT		24 38.7 20.2	38 61.3 49.4
PROHIBITED DRUG	3 6.0 9.7	31 62.0 26.1	16 32.0 20.8
DRUG OF ADDICTION (except leaf form I.H.)	6 13.6 19.4	29 65.9 24.4	8 18.2 10.4
LEAF FORM INDIAN HEMP	19 35.2 61.3	24 44.4 20.4	11 20.4 14.3
CULTIVATE	3 16.7 9.7	11 61.1 9.2	4 22.2 5.2
COLUMN TOTAL	31 13.7	119 52.4	77 33.9

* In 19 cases bail decisions were not determinable.

It is evident, by comparison with Table 4, that the courts are somewhat less inclined to refuse bail (at the first court appearance anyway) than the police; 49% of known police bail decisions are refusals, whereas 34% of known court bail decisions at first court appearance fall into this category. This greater willingness to

grant bail, however, would seem only a greater willingness to grant conditional bail since the percentage of cases in which unconditional bail was granted is very similar between police and court bail decisions (15.5% as against 13.7%). The difference in the willingness to grant conditional bail is most pronounced in cases involving import charges. The police in these cases grant conditional bail in 10% as against the 38.7% of cases where conditional bail is granted by the courts.

The order, among offence categories, in the rates of bail refusal is somewhat similar between police and first court bail decisions. Cases involving import charges are most likely to be associated with bail refusal, followed by cases in the category 'Prohibited Drug'. However, cases in the remaining categories exhibit fairly comparable rates of bail refusal at first court appearance, whereas, as we have seen, these cases are treated rather more disparately by the police. If perceived seriousness of the alleged offence is viewed as the main factor influencing rates of bail refusal it would seem that the courts, at first appearance, discriminate between fewer categories of offence than do police. Overall, the relationship between bail decision and the alleged offence is significant ($X2 = 54.3$, $df = 6$, $p<.01$).

3.3 Changes to Bail

Defendants are able to seek and courts empowered to make changes to bail arrangements at any court appearance by the defendant (2). Table 6, below, shows the relationship between the principal charge and the changes to bail up to the point where the case is finally disposed of (or, in certain cases, the defendant absconds). The category 'Increase' comprises changes to bail conditions in which bail is refused, having earlier been granted, or where more onerous bail conditions are imposed upon a defendant already granted bail. The category 'Decrease' comprises the reverse pattern of changes. The category 'Variable' comprises changes conforming to both 'Increase' and 'Decrease' kinds of change.

Table 6

Principal Charge by Changes to Bail Decisions*

COUNT
ROW PERCENTAGE
COLUMN PERCENTAGE

CHARGE	CHANGES TO BAIL DECISIONS			
	Increase	Decrease	No Change	Variable
IMPORT	6 9.5 24.0	17 26.9 22.4	40 63.5 17.6	
PROHIBITED DRUG	8 13.3 32.0	18 30.0 23.7	20 33.3 15.4	4 6.6 36.4
DRUG OF ADDICTION (except leaf form I.H.)	4 8.2 16.0	20 40.8 26.3	24 48.9 24.2	1 2.0 9.1
LEAF FORM INDIAN HEMP	6 10.7 24.0	16 32.6 21.1	32 57.1 34.1	2 3.5 18.2
CULTIVATE	1 5.5 4.0	5 27.7 6.6	8 44.4 8.8	4 22.2 36.4
COLUMN TOTAL	25 10.6	76 32.2	124 52.5	11 4.7

* In 10 cases changes to bail decisions were not determinable.

With the data from the category 'Cultivate' removed (the numbers are too small to warrant testing) the data shows no evidence of a relationship between principal charge and changes to bail decisions ($X2 = 12.8$, $df = 9$, $p>.05$). Nevertheless it is clear that the predominant tendency of the courts is to leave the existing bail decision unchanged (52.5% of cases). Where bail decisions are changed, most cases (32.2%) involve the granting of bail where it had been previously refused or the amelioration of existing bail conditions. Though it is not evident from Table 6, about half (51.4%) of cases in this category involved the granting of bail where it had previously been refused. The remainder (48.6%) involved an amelioration of bail conditions.

Despite the small numbers involved, it is interesting to note that the fact that 10.6% of cases fell into the 'Increase' category. This is somewhat surprising, given the general tendency for bail to be granted more readily between police bail and first court appearance. Ten of the twenty-five cases in the category involved the addition of or an increase in monetary conditions of bail. Six of the cases involved bail refusal where bail had earlier been granted. The remaining cases involved the addition of more stringent bail reporting conditions and other similar non-monetary impositions.

The Supreme Court, under Section 45 of the NSW Bail Act, may review any earlier bail decision made by a police officer, justice or judicial officer. There were Supreme Court bail reviews sought by the defendant in 27 cases within the sample. In 20 of those cases the review was of a bail refusal. Fifteen of these reviews resulted in bail being granted, conditional upon security being lodged by an acceptable person. In five of the 20 cases, the review upheld the decision to refuse bail. Six of the bail reviews involved an effort by the defendant to reduce the monetary conditions of bail. Three of the six were successful; the remaining three cases met with unchanged bail conditions. In addition to these reviews there were two others. The outcome of one was unknown but involved a review of bail conditions. The remaining case involved a Crown application against bail being granted. The application was successful.

3.4 Absconding

Table 7

Absconding by Principal Charge
for Defendants Granted Bail*

COUNT ROW PERCENTAGE COLUMN PERCENTAGE	ABSCONDING ?	
CHARGE	NO	YES
IMPORT	38 97.4 20.8	1 2.6 3.4
PROHIBITED DRUG	38 86.4 20.8	6 13.6 30.0
DRUG OF ADDICTION (except leaf form I.H.)	41 91.1 22.4	4 8.9 18.0
LEAF FORM INDIAN HEMP	48 84.2 26.2	8 14.0 27.6
CULTIVATE	18 94.7 9.8	1 5.3 3.4
COLUMN TOTAL	183 85.9	20 9.8

* This table excludes 33 cases in which bail was refused throughout and eight cases in which no genuine absconding had taken place. The latter group included cases where, for example, the defendant died or turned up at the wrong court or was arrested by police when reporting to them in compliance with his her bail conditions.

Table 7, above, shows the principal charge and the relative likelihood of absconding among those cases where bail was granted. There is no evidence of a relationship between principal charge and absconding ($X^2 = 3.1$, df. = 4, $p>.05$).

The absence of such a relationship, nonetheless, does not vouchsafe the conclusion that there is no relationship between the seriousness of the charge and the likelihood of absconding. Table 7 takes no account of the variations in quantities of drugs seized or alleged to be in the possession of the defendant. This may be crucial determinant of absconding. Table 8, below, addresses this issue. Drug quantities have been standardized along a single dimension so as to express a given drug quantity, regardless of drug type, as a percentage of the quantity designated 'commercial' under the NSW Drug Misuse and Trafficking Act (3). Frequencies appearing in each cell are frequencies of absconders and non-absconders, respectively, falling into each of the quantity ranges.

Table 8

Absconding Frequency by Drug Quantity*

COUNT ROW PERCENTAGE COLUMN PERCENTAGE	DRUG QUANTITY (Percent of Commercial Quantity)			
	5%	5-19 %	20-99%	over 100%
Non Absconders	72 39.5	62 34.1	25 13.7	23 12.6
Absconders	13 65.0	3 15.0	3 15.0	1 5.0
Column Total	85	65	28	24

*Excludes one case the drug quantities involved were unknown.

It is evident from inspection of the row percentages that there is no evidence of a tendency for absconders to congregate in the higher drug quantity ranges. If anything, the reverse is true. In fact, a X^2 test of the table proved negative ($X^2 = 6.5$, $df = 3$, $p<.05$);

Table 9 explores the relationship between the number of prior convictions (4) and absconding in cases where bail was granted.

Table 9

Absconding by Prior Convictions*

COUNT ROW PERCENTAGE COLUMN PERCENTAGE	ABSCONDING ?	
NO. OF PRIOR CONVICTIONS	NO	YES
None	77 91.7 42.1	7 8.3 35.0
1	39 95.2 21.3	2 4.8 10.0
2	24 92.4 13.1	2 7.6 10.0
3 - 5	28 85.7 15.3	3 14.3 15.0
6 - 9	7 77.8 3.8	2 22.2 10.0
10 +	5 56.6 2.7	4 44.4
Column Total	180	20

* Excludes 3 cases where the prior convictions were unknown.

Superficially, the data seem suggestive of the possibility that persons with long prior criminal records are were likely to abscond than those without such records. The frequencies involved in 5 of the 6 cells are too small, however, to justify statistical testing of the possibility. It is, for this reason, impossible to draw any definite conclusion on the relationship between prior criminal record and absconding.

Table 10

Characteristic Bail Conditions and Levels of Absconding*

COUNT ROW PERCENTAGE COLUMN PERCENTAGE	ABSCONDING ?	
BAIL CONDITIONS	NO	YES
Unconditional	35 89.7 21.0	4 10.3 14.3
Conditional, No Cash/Security	53 84.1 32.7	10 15.9 50.0
Conditional, Cash/Security	73 92.4 45.1	6 7.6 30.0
Column Total	162 89.0	20 11.0

* Excludes all cases where bail was refused throughout, 16 cases whose final bail decision was bail refusal and 7 cases where the final bail decision was unknown.

The next question which should be addressed is whether there is any relationship between the final level of bail conditions set and the likelihood of absconding. This is a difficult hypothesis to test sensitively, since there is so much scope for variation among bail conditions. The variation means that the frequencies on any individual combination of conditions are usually too low to justify the use of statistical tests. Some attempt must be made to address the issue, however, since the level of bail conditions set may determine the likelihood of absconding. Table 10, which follows, shows the grouped distribution of bail conditions between absconders and non-absconders.

The differences in conditions are not statistically related to the likelihood of absconding ($X^2 = 2.6$, $df = 2$, $p>.05$). Thus, bearing in mind the loss of test sensitivity associated with the grouping of conditions, the above data does not provide evidence that absconders may be differentiated from non-absconders in terms of the conditions of their bail.

3.5 Offending on bail

A frequent concern of law-enforcement agencies is the possibility that a person granted bail will commit further offences. The Bail Act (cf. s. 32 (1)(c)(iii)) makes express provision for bail refusal where this is a possibility. It is, however, difficult to assess the likelihood of reoffending, since it is not readily susceptible to detection. The best that can be done is to examine the frequency of those granted bail who are subsequently rearrested for further offences.

Excluding cases in which a bench warrant was issued for failure to appear in court, there were a total of 10 cases in which a person granted bail was rearrested. Eight of these arrests involved further alleged drug offences. Thus, within the sample of those granted bail, 4.9% were rearrested for further alleged offences while 3.9% were rearrested for further alleged drug offences. The number of cases involved is too small to warrant any detailed examination of the offences involved in individual cases. It is also impossible to determine what proportion of those who reoffended escaped detection or what proportion of those rearrested who were subsequently acquitted.

3.6 Remand Periods and Case Outcomes

There are two final questions to be addressed in this part of the report. The first concerns the periods spent on remand by those who are either refused bail, or who are either unable to meet their bail conditions at all or for some period of time. The second concerns the outcomes of those who are charged with serious drug offences. the first of these questions is examined below in connection with Table 11.

Table 11

Distribution of Remand Periods

PERIOD OF REMAND	Frequency	Percentage	Cum. Percentage
Under 1 month	55	44.3	44.3
Over 1 month to 3 months	24	19.3	63.6
Over 3 months to 6 months	17	13.7	77.3
Over 6 months to 12 months	20	16.2	93.5
Over 12 months	8	6.5	100.0
Total	124	100.0	100.0

It is evident that 44% of those who spent some period in custody, spend less than 1 month. This group probably comprises the bulk of those who are eventually released to bail. What is perhaps more striking, however, is that a large number of those charged with drug offences in this sample, spent lengthy periods in custody, on remand. Over a third (36.4%) spent more than 3 months in custody awaiting trial. This finding will be taken up in greater detail in the discussion.

The final table, Table 12, shows the relationship between bail decisions and charge outcome within the sample. There are several features of Table 13 which deserve comment. Firstly, the likelihood of a charge being withdrawn or the defendant being found not guilty is relatively low but is significantly higher for those granted bail than for those not granted bail ($X2 = 7.8$, $df = 1$, $p < .01$) (5).

What the data in Table 12 do not show is that in 44.8% (82) cases in which bail was known to have been refused or bail conditions known to have not been met at some stage or other, the defendant was ultimately found not guilty or given a non-custodial sentence (6). It is apparent, then, that nearly half of those remanded in custody for one reason or another may be judged (albeit with the benefit of hindsight) to have been inappropriately remanded in custody.

TABLE 12

BAIL DECISION BY OUTCOME

Count Row Pct Col Pct	Not Guilty/ Withdrawn	Non Cust-odial	Periodic Detention	Cust-odial Under 1 Yr	Cust-odial 1 - 3 Yrs	Cust-odial 3 - 5 Yrs	Cust-odial 5 - 10 Yrs	Cust-odial 10 - 15 Yrs	Other	Not Finalised	Row Total
BAIL GRANTED	27	82	7	3	24	23	18	6	7	16	213
	12.7	38.5	3.3	1.4	11.3	10.8	8.5	2.8	3.3	7.5	86.6
	96.4	98.8	100.0	100.0	80.0	82.1	58.1	46.2	100.0	100.0	
BAIL REFUSED	1	1			6	5	13	7			33
THROUGHOUT	3.0	3.0			18.2	15.2	39.4	21.2			
	5.6	1.2			20.0	17.9	41.9	53.8			13.4
COLUMN TOTAL	28	83	7	3	30	28	31	13	7	16	246
	11.4	33.7	2.8	1.2	12.2	11.4	12.6	5.3	2.8	6.5	100.0

Notes

1. Because they are unable to meet the bail conditions set.

2. See s 22(1) N.S.W. Bail Act.

3. See the N.S.W. Drug Misuse and Trafficking Act (1985), ss. 3(1), 44 and Schedule 1.

4. There are adult convictions excluding traffic convictions.

5. For the purposes of this analysis, the sentence ranges were collapsed into two groups, above and below 5 years.

6. Cases withdrawn and/or dismissed are included in the 'not guilty' category.

4.0 Discussion

The present results show a progressive increase in the likelihood of bail being granted between police consideration, first court appearance and final disposition of the case. The police refused bail to 49% of the sample of persons charged with indictable drug offences. At first court appearance, the rate of bail refusal fall to 34%. By the time of the last court appearance, only 33 defendants (13.4% of the sample) had been refused bail throughout the proceedings. Accompanying this increase in the likelihood of bail being granted was an easing of bail conditions between police bail determination and final disposition.

Both the police and first court appearance bail decisions were found to be strongly related to the nature of the charge. Bail was particularly likely to be refused in relation to import charges. Only 10% of these cases were granted bail by the police. While this figure rose to 38.7% at the first court appearance, rates for other classes of offence in the sample at this stage ranged from 66% to 79.5%. Of the 33 cases refused bail throughout, 24 (72.7%) were cases involving import charges.

The rate of absconding on bail was assessed at 9.8%. In view of the high rate of bail refusal in connection with import charges, it is impossible to say whether this group would have had a higher rate of absconding if granted bail. In considering recent amendments to the NSW Bail Act, however, their likely rate of absconding if granted bail is perhaps less important than the finding that they are not generally granted bail. We see in this result a statistical reflection of the point made earlier; that the presumption in favour of bail may be overborne by other considerations. Clearly the presumption in favour of bail for (among others) persons charged with importing a prohibited drug was no impediment to bail refusal for such persons.

What of the question of whether bail is granted too readily ? The question is impossible to answer without prior agreement as to what constitutes a tolerable rate of bail refusal. Obviously a very high proportion of defendants facing indictable drug charges ultimately obtain bail. Against this must be weighed the point that a high proportion of those who ultimately obtain bail are refused bail in the first instance (cf. Table 4). This may be due to a lower rate of legal representation or the absence of relevant information when a defendant first appears before a court. The explanation, however, does nothing to disturb the suggestion that too many defendants are being refused bail at

first court appearance. If anything, it invites an extension of legal aid to bail consideration in order to ameliorate the problem.

The chief difficulty in determining a tolerable rate of bail refusal is this. The judgment of whether a person granted bail will appear to face the charges against them and not offend while on bail must always be grounded in imperfect knowledge. It is not difficult to identify factors predictive of future absconding or further offending. Generally speaking, however, these are imperfect predictors. If they are ignored entirely there is no doubt that the rate of absconding and the rate of further offending will rise. If, on the other hand, they are followed slavishly, the number of people unjustifiably detained in custody will also rise. The rate of absconding thus reflects, in some degree, the balance being struck between the competing social objectives of ensuring that these subject to criminal charges are brought to trial, while ensuring that defendants are not unfairly detained in custody before they have been tried or convicted.

In the present case, data on absconding suggest that the more extreme claims about the likelihood of persons facing drug charges either absconding or committing further offences while on bail are false. The results highlight the dangers of basing claims for law reform on individual, highly publicized cases. Such cases may serve to illustrate the dilemma faced by those involved in bail decisions, but do nothing to provide a rational basis for weighing the risks involved. By creating a false impression of those risks, public confidence in the system of bail is unjustifiably eroded. This carries with it social and economic costs, both for the offender and for the wider community.

It is salutary to remember, in this connection, that nearly half of the current sample who were remanded in custody <u>at some stage or other</u>, were subsequently acquitted, had the case against them withdrawn or dismissed, or received a non-custodial penalty.

The present data also militate against further alterations to the presumption in favour of bail in respect of specified drug offences. No evidence was found linking either the charge or the quantity of drugs involved with a defendant's risk of absconding.

Nor was any evidence found linking absconding to particular patterns of bail conditions or the defendant's prior criminal record. To some extent, the infrequency of absconding makes it difficult to draw firm conclusions on whether such relationships might have been found of a larger sample had been obtained. Nevertheless there was nothing in the data even suggestive of the possibility that one or other category of alleged drug offender was more likely to abscond. There is thus little reason to suppose that the rate of absconding could be reduced even further if the presumption in favour of bail were removed for certain classes of alleged drug offence.

The study, as a whole, underlines the need for continuous monitoring of bail decisions in the same way as currently occurs in relation to court appearances.

The subject of bail is so frequently in the news and so much the subject of critical attention that a continuous and comprehensive monitoring of bail decisions is warranted. The alternative of relying on special studies addressing restricted issues in bail, offers only a reactive capacity for objectively evaluating claims made about the operation of the bail system. His Honour, Justice Stewart, has in the past (2) also recommended that bail decisions be the subject of continuous monitoring. The development of the Justice Information System, as part of the range of recent government reforms to the administration of justice in New South Wales, provides a timely opportunity to implement such a scheme.

Notes

1. See, for example, S. Armstrong. An application of the Manhattan Bail System to New South Wales Offenders. Seminar on Bail. Proceedings of the Institute of Criminology, University of Sydney, 1969, pp. 39.

2. Report of the Royal Commission of Inquiry into Drug Trafficking. Mr. Justice Stewart (Commissioner). Recommendation 80. PP. 551.

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